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Petition

81-588

Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RANDY S. KINKEAD,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Is it a denial of a criminal defendant's Fourth and Fourteenth Amendment rights against unreasonable search and seizure for plain clothed police to enter his residence to arrest him without a warrant and without identifying themselves or stating their purpose?

2. Is it a denial of a criminal defendant's Fourteenth Amendment rights to due process of law for a state court to impose a fine that the individual cannot afford to pay?

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OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania has not yet been reported. It is attached hereto as Appendix "A".

The Opinions of the Superior Court of Pennsylvania both in support of affirmance and in support of remand are reported at ____ Pa.Super ____, 390 A.2d 836 (1978), and are attached hereto as Appendix "B" and "C" respectively.

The Opinion of the Court of Common Pleas of Centre County is reported at 11 Centre Co. L.J. 643 (1976) and is attached hereto as Appendix "D".

JURISDICTION

The Judgment and Opinion of the Supreme Court of Pennsylvania was entered on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Eighth Amendment to the United States Constitution, in pertinent part:

> "Excessive bail should not be required, nor excessive fines imposed. . . ."

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> ". . . nor shall any State deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner was found guilty, following trial by jury, of delivery of marijuana and was sentenced to undergo imprisonment in the Centre County Jail for a period of not less than six (6) nor more than twenty-three (23) months and to pay a fine of Ten Thousand ($10,000.00) Dollars and the cost of prosecution. The relevant facts are as follows:

An undercover drug agent, Thomas Gray, made friends with three individuals identified as Rick Maurone, Butch Molesky and Gary Scarpello, whom the agent believed to be involved in the drug traffic. He ar-

ranged with them to make a "buy" from the petitioner, then unknown to him. The four proceeded in an automobile to a parking lot adjacent to a house at 248 East Prospect Avenue in State College, Pennsylvania. They arrived at 8:00 P.M. on October 29, 1975. The purchase involved 100 pounds of marijuana at a price of $12,000. In order not to be "ripped off," Agent Gray sent Maurone and Molesky into the house with $1,000 of marked bills on the understanding that they would bring out half of the marijuana and then returned to the house with the balance of the money to complete the transaction. Molesky and Maurone were watched by Agent Gray and Scarpello advised Agent Gray where they were in the house when a light was turned on on the second floor. Molesky and Maurone returned with several large bags of marijuana which were placed in the trunk of Agent Gray's car. He immediately arrested Maurone, Molesky and Scarpello. He then directed two plain clothed law enforcement officers who were standing close by to secure the premises at 248 Prospect Avenue. As they proceeded to do so, they were joined by three other plain clothed law enforcement agents identified as Kerr, Stevens and Britt. As they ascended the front porch, one of the occupants of the house was standing on the porch and the front door was wide open. They entered the house and collected all of the occupants, four or five in number, including the petitioner and ordered them to remain seated in the living room.

From the information received by Agent Gray and Molesky, Maurone and Scarpello, petitioner was identified as the seller, placed under arrest and given his *Miranda* warnings. He admitted his participation in the offense and agreed to show where the $1,000 of marked bills was located.

At trial, certain incriminating evidence was introduced over petitioner's objection: The fact of his presence at the scene of the crime, his admission that he was the supplier of the marijuana, one thousand ($1,000.)

dollars in marked one hundred ($100.) dollar bills, and a quantity of marijuana.[1]

Petitioner was convicted and sentenced to serve a term of imprisonment of six (6) to twenty-three (23) months and to pay a fine of Ten Thousand ($10,000.00) Dollars plus the cost of prosecution. This fine was imposed despite the fact that there was no evidence that petitioner could afford to pay this amount.[2]

Thereafter, the Supreme Court of Pennsylvania granted petitioner's request for allowance of appeal[3] and on July 10, 1981, affirmed the judgment of the Superior Court. Petitioner now seeks review of this decision by this Court.

REASON FOR GRANTING THIS WRIT

THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PRIOR DECISIONS OF THIS COURT ON THE QUESTION OF SEARCH AND SEIZURE. INSOFAR AS THE SENTENCING ISSUE, THE COURT BELOW HAS DECIDED A QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Opinion below conflicts with the rationale of prior decisions of this Court, including *Payton v. New*

---

1. Prior to trial, petitioner had unsuccessfully sought to have this evidence suppressed on the ground that it was obtained in violation of his Fourth and Fourteenth Amendment guarantees against unreasonable search and seizure.

2. The Superior Court unanimously rejected petitioner's argument that the Fourth and Fourteenth Amendments to the United States Constitution barred the warrantless, unannounced entry into his home but split 3 - 3 on the question of whether he could be sentenced to pay a fine of Ten Thousand ($10,000.00) Dollars without any showing that he was able to pay the fine.

3. Similar to a Petition for Writ of Certiorari.

York, 445 U.S. 573 (1980) (Fourth Amendment prohibits police, in the absence of exigent circumstances, from making a warrantless entry into a suspect's home for the purpose of effecting an arrest); *Ker v. California*, 374 U.S. 23 (1963) (announcement of both authority and purpose required before police may enter private premises to effect an arrest or search); *Miller v. United States*, 357 U.S. 301 (1958) (arrest unlawful and currency seized thereafter held inadmissible since police had not expressly demanded admission or stated their purpose for their presence before forcibly entering defendant's apartment).

The Fourth Amendment prohibition against unreasonable search and seizure clearly demands that, ordinarily, before a police officer enters upon private premises to conduct a search or to make an arrest, he must first obtain a warrant and then give notice of his identity and purpose. The only exception is when exigent circumstances justify the failure to give notice. *Payton v. New York, supra; Ker v. California, supra; Miller v. United States, supra.* By holding that there was no need for the police to obtain an arrest or search warrant before making their entry in this case and by further holding that there was no need for the police to identify themselves (despite the fact that they were not in uniform) and to announce their purpose, the Pennsylvania Courts have refused to recognize relevant and applicable decisions of this Court with respect to the warrant requirements of the Fourth Amendment as made applicable to the States by the Fourteenth Amendment and, furthermore have departed from the notice requirements set down by this Court in *Ker v. California, supra* and *Miller v. United States, supra.*

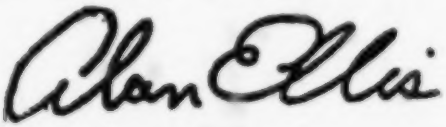
The Eighth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment clearly prohibits the imposition of excessive fines. By not taking into account whether the fine in this case was one that petitioner could afford to

pay (indeed, the evidence was to the effect that he could not afford to pay the fine) the Pennsylvania Courts have decided a question of important federal constitutional law which had not been, but should be, decided by the Court.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully urged that a Writ of Certiorari should issue to review the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,



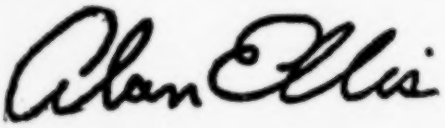
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 1981, three copies of the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania were mailed by first class mail to Lee G. Nollau, Esquire, District Attorney of Centre County, Centre County Courthouse, Bellefonte, Pa. 16823. I further certify that all parties required to be served have been served.



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APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

Randy S. Kinkead, *Appellant*	: No. 503 January Term 1978
v.	: Appeal from an Order of the Superior Court, No. 7 October Term 1977 Affirming the Judgment of Sentence imposed by the Court of Common Pleas of Centre County at No. 1975-881.
Commonwealth of Pennsylvania	:
	: SUBMITTED: January 22, 1981

OPINION

PER CURIAM

The Order of the Superior Court is affirmed.

APPENDIX B

Commonwealth of Pennsylvania	:	In the Superior Court of
vs.	:	Pennsylvania
	:	Philadelphia District
Randy Kinkead,	:	No. 7 October Term,
Appellant	:	1977

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Centre County, at No. 881 of 1975.

OPINION IN SUPPORT OF AFFIRMANCE.

By VAN DER VOORT, J.:

This is an appeal from a judgment of sentence following jury verdicts of guilty on charges of delivery of a controlled substance (marijuana) and possession with intent to deliver. Appellant contends that the judgment should be reversed and a new trial ordered because the trial court refused to suppress evidence obtained in the process of arresting appellant without a warrant and searching his home on a warrant which was allegedly defective. He advances the subordinate contentions that the testimony of a chemist that the controlled substance was in fact marijuana should have been stricken because not sufficiently established, and that the $10,000 fine imposed as part of his sentence is excessive. There is no merit in any of these contentions.

The facts as found by the trial judge at the suppression hearing are undisputed. An undercover drug agent of the Commonwealth, Thomas Gray, made friends with three individuals identified as Rick Maurone, Butch Molesky and Gary Scarpello, whom the agent believed to be involved in the drug traffic. He arranged with them to make a "buy" from the appellant, then unknown to him. The four proceeded in an automobile to a parking lot adjacent to a house at 248 East Prospect Avenue in St. College Borough. They arrived at 8:10 P.M. on October 29,

1975. The purchase involved 100 pounds of marijuana at a price of $12,000. In order not to be ripped off, Agent Gray sent Maurone and Molesky into the house with $1,000 of marked bills on the understanding that they would bring out half of the marijuana and then return to the house with the balance of the money to complete the transaction. Molesky and Maurone were watched by Agent Gray and Scarpello until they entered the house. Scarpello advised Agent Gray where they were in the house when a light was turned on on the second floor. Molesky and Maurone returned with several large bags of marijuana which were placed in the trunk of Agent Gray's car. He immediately arrested Maurone, Molesky and Scarpello. He then directed two law enforcement officers who were standing close by to secure the premises at 248 East Prospect Avenue. As they proceeded to do so, they were joined by three other law enforcement agents identified as Kerr, Stevens and Britt. As they ascended the front porch, one of the occupants of the house was standing on the porch and the front door was wide open. They entered the house without force and collected all of the occupants, four or five in number, including the appellant, and asked them to remain seated in the living room.

From the information received by Agent Gray from Molesky, Maurone and Scarpello, the appellant was identified as the seller, placed under arrest and given his Miranda warnings. He admitted his participation in the offense and offered to show where the $1,000 of marked bills was located.

The agents did not search the house until a search warrant was secured. Agent Gray and Officer Abernathy proceeded to State College Municipal Building to prepare the search warrant affidavit, but because of the hour they had to travel approximately 15 miles to the Bellefonte area to find a district justice of the peace. The district justice issued a search warrant at 11:10 P.M. Gray and Abernathy then returned to 248 East Prospect

Avenue at approximately 11:45 P.M. and conducted a detailed search of approximately two and one-half hours after again advising the appellant of his constitutional rights. Agent Gray was under the belief that half of the marijuana that Maurone and Molesky had purchased was still on the premises when the affidavit for the search warrant was prepared and the warrant granted. As it turned out, they had brought out the entire 100 pounds of marijuana on their initial visit to the premises. At all times the appellant admitted that the marijuana involved was his, apologizing to his friends in 248 East Prospect Avenue and to Maurone, Molesky and Scarpello for causing them so much trouble. At the conclusion of the search, the appellant was taken to the State College Borough police office at around 3:00 or 3:30 A.M., and from there to a preliminary arraignment before the district justice of the peace between 4:00 and 5:00 A.M. Our court should have no difficulty in sustaining the warrantless arrest of the appellant. Two persons, Maurone and Molesky, had reported to Agent Gray immediately before the arrest that they had received marijuana from the appellant and had made a $1,000 down payment on it. He saw them enter the appellant's house and return with bags of marijuana. Maurone and Molesky told him they had purchased it from the appellant. These facts established the probability that a felony had been committed, and were sufficient to justify the arrest of the appellant without a warrant: *Commonwealth v. Rush*, 459 Pa. 23, 25, 326 A.2d 340 (1974); *Commonwealth v. Jackson*, 450 Pa. 113, 116-17, 299 A. 2d 213 (1973).

The circumstances under which the arrest was made do not bring this case within *Commonwealth v. Newman*, 429 Pa. 441, 240 A.2d 795 (1968). The arresting agent was accompanied by borough police who entered the premises through an open front door without resistance. It would have been self-defeating for the officers who have stopped at the open front door, knocked,

waited for the appellant to appear and then identified themselves. Appellant was in the midst of a $12,000 marijuana transaction and there was commotion outside. It was a reasonable assumption that the appellant, if given time to do so, would attempt to remove or destroy the remaining marijuana and secrete or destroy the $1,000 in marked bills which were in his possession. Agent Gray testified at the suppression hearing that he was concerned about the destruction of evidence. *Newman* had no application to a situation such as this.

When the appellant was arrested, he and the other occupants of the premises were detained in the first floor living room until a warrant could be obtained to search the premises. We now address ourselves to the argument that the application for if a common sense reading of the affidavit supporting a search warrant indicates that sufficient information was provided the issuing magistrate to show the probability of illegal activity or contraband at the place to be searched, our court will not find the warrant invalid. See *Commonwealth v. Williams*, 236 Pa. Superior Ct. 184, 345 A.2d (1975) and *Commonwealth v. Temple*, 232 Pa. Superior Ct. 453, 335 A.2d 805 (1975). A commonsense reading should be given the affidavit, and doubtful or marginal cases should be resolved in favor of upholding the warrant. *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965).

The affidavit on which the warrant in this case was issued abundantly establishes probable cause. Reading the application for the warrant in its entirety makes quite clear that the date of the occurrence set out in the affidavit was October 29, 1975, that the premises to be searched had been secured earlier that same evening and were being held by officers pending the issuance of a warrant. The application shows that marijuana was believed to be on the premises and that it was in danger of being destroyed unless a search could be made at once.

The petition was quite adequate to support the issuance of the warrant.

Appellant's next contention is that the testimony of an expert witness that the substance was in fact marijuana should have been stricken. State police chemist, Larry Reigle, testified as an expert that chemical tests made by him established that the material sold by the appellant was marijuana. Under cross examination, he conceded that he had not personally tested the reagents used in making the tests, although he had reason to believe them to be as labeled and properly used. Appellant's counsel moved to strike Reigle's testimony because of this admission. The motion was properly denied. The admission went to the credibility of the testimony, not to its admissability. Credibility was an issue for the jury and it chose to believe the testimony.

Finally, appellant challenges as excessive the $10,000 fine that was imposed as part of his sentence. The trial court has a broad discretion in imposing sentences: *Commonwealth v. Hill*, 237 Pa. Superior Ct. 353 A.2d 870 (1975). We stated in *Hill* that there was no abuse of discretion unless the sentence was so manifestly excessive as to inflict too severe a punishment. In the case before us the pre-sentence investigation report compiled by the Pennsylvania Board of Probation and Parole ascertained that appellant was part owner and operator of a clothing store on Beaver Avenue and State College, and that he was also involved in a South American import operation dealing in clothing and artifacts. The facts of this case demonstrate that he was able to obtain marijuana worth $12,000. Under these circumstances, the fine does not appear to be excessive. It may be difficult to pay, but it was not an abuse of discretion.

The judgment of sentence should be affirmed.

CERCONE, J., joins in this opinion.

APPENDIX C

Commonwealth of Pennsylvania *v.* Randy Kinkead, *Appellant*	:	In the Superior Court of Pennsylvania Philadelphia District No. 7 October Term 1977

Opinion filed July 12, 1981

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Centre County, at No. 881 of 1975.

OPINION IN SUPPORT OF REMAND

By SPAETH, J.:

Appellant contends that the imposition of a $10,000 fine was excessive. Although a trial judge has broad discretion in imposing sentences, in regard to the imposition of fines the Sentencing Code, 18 Pa.C.S.A. §1326, provides as follows:

> (c) Exception. — The court shall not sentence a defendant to pay a fine unless it appears of record that:
>
> > (1) the defendant is or will be able to pay the fine; and
> > (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.
>
> (d) Financial resources. — In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.
>
> 1972, Dec. 6, P.L. 1482, No. 334, §1326, added 1974, Dec. 30, P.L. 1052, No. 345, §1, effective in 90 days.

The majority concludes that this standard was met since appellant was able to obtain $12,000 to purchase the marijuana, and since appellant's pre-sentence report reveals that he is a part owner and operator of a clothing store and is involved in an import business. The record clearly does disclose that appellant obtained $12,000. However, in regard to appellant's "financial resources," appellant, in his brief, quotes from his pre-sentence report as follows:

> *EMPLOYMENT:*
>
> Mr. Kinkead is presently part owner/operator of The Chameleon, a clothing store on Beaver Avenue, State College. The store is operated on a consignment basis with the defendant drawing a modest salary plus commission. He also is involved in Taparacu, a South American Import operation, importing clothing and artifacts. His partner in both operations is Richard Myers of Whipple Dam.
>
> *FINANCIAL CONDITION:*
>
> The defendant claims to own nothing since his assets are more than outweighed by his indebtedness. He has some equity in The Chameleon, but owes his family and pays $40 a month for an auto wreck he was in.

It 42not possible to determine either whether this quotation is accurate, or whether the report contained additional or conflicting statements, for there are no notes of testimony of the sentencing hearing in the record. It is therefore not possible to review the information available to the hearing judge at the time of sentencing, or to review the judge's reasons for the sentence imposed. The only facts that do appear of record are that at one time appellant possessed $12,000, and that his appeal to this court was *in forma pauperis*, indicating a present inability to pay the fees and costs of prosecuting an appeal. *See*

Pa.R.App.P. 551-561. These two facts do not support the conclusion that appellant "is or will be able to pay" a $10,000 fine. I would therefore remand the case for resentencing.

JACOBS, P.J., AND HOFFMAN, J., join in this opinion.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CRIMINAL

Commonwealth	:	No 1975 — 881
v.	:	
Randy S. Kinkead	:	

OPINION

CAMPBELL, P.J.

A jury found the defendant guilty of Possession, Sale and Delivery of 100 pounds of marijuana. The intended purchase price was $12,000.00, of which amount only $1,000.00 was paid. Defendant's motions in arrest of judgment and for a new trial await our disposition. We have carefully examined each of the eleven reasons advanced and can find no merit in any of them.

The evidence in this case is of such quality and so convincing that the Court would have been shocked at any other verdict than that which was brought in by the jury. We feel obliged to comment on only a few of the assigned reasons for the post trial motions.

Undercover agents of the Bureau of Drug Control were directed to 248 East Prospect Avenue in State College Borough by persons known to the defendant for the purpose of conducting a purchase and a sale of 100 pounds of marijuana for $12,000.00. While the Drug Control agents remained in an adjoining parking lot, the persons known to the defendant entered the residence with part of the purchase price and returned therefrom with 100 pounds of marijuana. They were promptly placed under arrest and the premises were entered and the defendant placed under arrest. While we believe in this case that a search warrant was unnecessary, through an abundance of caution the officers made no search until one was secured. After the defendant was

given his Miranda warnings, he admitted ownership of the marijuana and offered to point out the $1,000.00 in bills belonging to the Commonwealth, whose serial numbers were previously recorded. We can find nothing that would indicate any irregular search or seizure, and nothing that would prevent the admitting of statements made by the defendant.

The Commonwealth placed a State Crime Lab chemist on the witness stand, who testified as to his examination of the contraband and that in his opinion it was marijuana. He further testified that all of the marijuana which he had ever examined and identified as such contained tetrahydrocannabinol. Defense counsel complains that we refused his motion to strike this testimony. We see no reason to do so. He likewise takes the position that the definition of marijuana is unconstitutionally void for vagueness. We believe the presumption of constitutionality is sufficient to sustain it and we know of no appellate courts holding the contrary.

Defense counsel vigorously attempted to discredit the two Commonwealth witnesses who took the undercover agents to the premises on the grounds that they had made a deal and secured leniency in return for their testimony. All witnesses, including the Bureau of Drug Control agents and the District Attorney, made complete disclosures of all of the facts and circumstances; the jury had complete knowledge. The most favorable fact to the defendant was that the Bureau's agents offered to recommend leniency if they cooperated. The record is abundantly clear that there was no promise or plea bargain and the actual sentences imposed upon them were known to the jury. In addition, the jurors were properly cautioned with respect to the credibility of the witnesses.

Finally, defendant contends that the Commonwealth did not prove that the defendant was not registered with the Secretary of Health to sell the marijuana. No issue was made on this point during the time of trial. The facts and circumstances in this case are such that

no reasonable person could conclude that the defendant was licensed; if he were I am sure he would have advanced this reason in his defense. The case of *Commonwealth v. Stawinsky*, _____ Pa. Super. _____, 339 A.2d 91 (1975) holds that the Commonwealth is not required to prove that a defendant charged with the delivery of marijuana is not registered with the Secretary of Health. We do not believe that the case of *Commonwealth v. McNeil*, _____ Pa. _____ 337 A.2d 840 (1975) is applicable in this case since it involves the carrying of a firearm without a license. In that offense the absence of a license is an essential element of the crime.

We therefore enter the following

ORDER

AND NOW, July 12, 1976, defendant's motions in arrest of judgment and for a new trial are refused, and the defendant is ordered to appear for sentencing at the direction of the District Attorney.

By the Court:

P.J.